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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Heath P. Taylor, Circuit Court Judge

Case No. 2025-000484

State of South Carolina, Respondent,

v.

Jaquan L. King, Appellant.

APPELLANT'S INITIAL BRIEF

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT AND STATEMENT OF THE CASE

Appellant Jaquan Leon King respectfully submits this brief seeking reversal of his convictions for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime and remand for a new trial. (T. p. 217, lines 10–18; T. p. 963, lines 24–25; T. p. 964, lines 1–3.) The charges arose from a late-night shooting in the parking lot of a restaurant complex on Oneil Court in Richland County. (T. p. 218, lines 1–8; T. p. 219, lines 1–8.) After a multi-day jury trial at which the State's case centered on eyewitness identifications, a photograph of a gray Ford Fusion, and physical evidence recovered from that vehicle, the jury found Mr. King guilty on all counts. (T. p. 919, lines 19–25; T. p. 920, lines 1–8; T. p. 921, lines 1–4; T. p. 955, lines 4–12.)

On appeal, Mr. King contends that several rulings and events, individually and cumulatively, require a new trial. First, he challenges the denial of his motion to dismiss or, alternatively, for a spoliation instruction where law enforcement did not preserve multiple categories of investigative material bearing on identity, including surveillance video from the Inakaya restaurant, handwritten notes from an interview with an off-duty officer who was on scene, and body-worn camera recordings from additional responding officers who appear on other videos wearing cameras. (T. p. 821, lines 1–25; T. p. 822, lines 1–7; T. p. 923, lines 3–15; T. p. 924, lines 1–7.)

Second, he challenges the admission of the photograph of the gray Ford Fusion that initiated the vehicle investigation, where the State never collected or forensically examined the phone on which it was taken and offered no metadata or other objective proof of when or where the photograph was created, after the image had circulated through social media. (T. p. 923, lines 3–25; T. p. 924, lines 1–7.) Third, he challenges the admission of physical evidence recovered

from a warrantless search of that Ford Fusion—including his South Carolina identification card, latent prints, and DNA swabs—on the grounds that the search flowed directly from the challenged photograph and that the State's showing of voluntary consent by a person with authority was not adequately developed on the record. (T. p. 821, lines 8–25; T. p. 822, lines 1–7; T. p. 923, lines 3–15.)

Most critically, Mr. King asserts that prosecutorial misconduct in rebuttal closing argument deprived him of a fair trial. During rebuttal, the solicitor repeatedly suggested that Mr. King's father and girlfriend were obliged to acknowledge that the Ford Fusion was Mr. King's car, to cooperate with law enforcement, and to disclose his whereabouts on the night of the shooting, asking the jury, among other things, "Why did Jack King and Ashley Walcott withhold the information? I don't understand. What is there to hide? Why won't they speak Jaquan's name? Why won't they tell us where he was that night?" (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3.)

These remarks invited the jury to draw adverse inferences from Mr. King's and his family members' silence and failure to present evidence, and to treat that silence as substantive proof of guilt, thereby improperly shifting the burden of proof notwithstanding the court's instructions that Mr. King was not required to testify or prove his innocence. (T. p. 822, lines 3–25; T. p. 823, lines 1–13; T. p. 963, lines 24–25; T. p. 964, lines 1–5; T. p. 965, lines 1–7; T. p. 966, lines 1–3.)

As developed in Issue IV, Mr. King submits that these comments warrant reversal and a new trial under federal precedent, including *Griffin v. California*, 380 U.S. 609 (1965), *Berger v. United States*, 295 U.S. 78 (1935), and *Darden v. Wainwright*, 477 U.S. 168 (1986), and under controlling South Carolina decisions such as *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164

(1998), *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001), and *Fortune v. State*, 428 S.C. 545, 836 S.E.2d 802 (2019).

STATEMENT OF THE FACTS

A. Investigation and Pretrial Motions Concerning Unpreserved Evidence

During pretrial motions, defense counsel advised the trial court of concerns about unpreserved evidence arising from the investigation. (T. p. 821, lines 1–7.) Counsel stated that officers reported viewing surveillance video from the Inakaya restaurant, which had a camera pointed toward the parking lot where the shooting occurred, but that no copy of this video was collected or produced in discovery. (T. p. 821, lines 7–13.) Counsel also represented that an investigator conducted a lengthy interview with an off-duty Charleston County officer who was present during the incident, took handwritten notes described on other recordings as “copious,” and that no notes or report of this interview were disclosed. (T. p. 821, lines 13–20.) In addition, body-worn camera footage was produced for some responding officers, but videos in the record showed other officers at the scene wearing cameras that appeared to be powered on, and no corresponding recordings were provided. (T. p. 821, lines 20–25.) Defense counsel argued that these omissions were inconsistent with the sheriff’s department body-camera policy requiring officers to record interactions with the public. (T. p. 821, lines 20–25.)

The investigation into a vehicle allegedly connected to the shooting began with a photograph taken by a patron, identified at trial as Kiara, using her mobile phone in the parking lot. (T. p. 923, lines 3–10.) In pretrial argument, defense counsel noted that law enforcement did not seize the phone or conduct a forensic download and therefore could not produce metadata establishing the time or GPS location associated with the image. (T. p. 923, lines 10–18.) The record reflects that the photograph was later disseminated via social media, and that information

relayed to witnesses through that post led officers to a gray Ford Fusion parked at a residence associated with Mr. King. (T. p. 923, lines 18–25.)

Investigators searched the vehicle without a search warrant. (T. p. 821, lines 8–13.) At the pretrial hearing, the State contended that the vehicle's registered owner, Ashley Walcott, provided consent for the search, stating that officers had a signed consent form from her and that she gave consent on body camera. (T. p. 821, lines 8–13.) From this search, the State recovered a South Carolina identification card belonging to Jaquan Leon King from the center console, and investigators collected seven latent print cards and twenty DNA swabs from various locations on and in the vehicle. (T. p. 821, lines 13–20.)

Before trial, defense counsel moved to suppress the vehicle photograph on the ground that the State had not laid a sufficient foundation for its admission and moved to suppress all evidence from the vehicle based on the manner in which the car was located and searched. (T. p. 821, lines 1–7; T. p. 923, lines 3–18.) The trial court indicated that the absence of metadata alone would not render the photograph inadmissible if a witness could authenticate it. (T. p. 923, lines 10–18.) The State argued that Mr. King lacked standing to object to the search of a vehicle registered in his girlfriend's name and relied on Ms. Walcott's purported consent. (T. p. 821, lines 8–13.)

During the direct examination of Investigator Tucker Kovalchek at trial, the State offered the DNA swabs (State's Exhibits 35–43) and the identification card (State's Exhibits 21–22) into evidence, and in both instances defense counsel stated there was "no objection." (T. p. 821, lines 13–20.)

ARGUMENT

ISSUE I — FAILURE TO PRESERVE MATERIAL EVIDENCE (SPOLIATION / DUE PROCESS)

A. Statement of the Issue

Whether the trial court erred in denying Appellant's request for dismissal of the indictments or, in the alternative, a spoliation instruction where the State failed to preserve material and potentially exculpatory evidence—including body camera footage from numerous officers, surveillance video from a nearby business, and an investigator's handwritten notes from an eyewitness interview—thereby violating Appellant's rights to due process of law.

B. Standard of Review

A trial court's decisions regarding sanctions for lost or destroyed evidence and whether to give a spoliation or adverse-inference instruction are reviewed for abuse of discretion. See S.C. R. Evid. 103(a)(1). To the extent the failure to preserve evidence implicates federal due process, appellate courts apply the framework from *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988), under which reversal is required when the State fails to preserve evidence with apparent exculpatory value that is not otherwise reasonably obtainable, or when potentially useful evidence is destroyed in bad faith. Whether a due-process violation has occurred is a question of law reviewed de novo, but any remedy imposed is reviewed for abuse of discretion. See, e.g., *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998).

C. Factual Basis From the Record

The defense made a pretrial motion seeking dismissal or, alternatively, a spoliation instruction based on the State's failure to preserve several categories of evidence. (T. p. 821.) The record reflects the following specific items:

1. Inakaya Restaurant Surveillance Video: According to defense counsel, officers reported that they viewed surveillance video from the Inakaya restaurant on the night of the

incident; the camera was described as pointing toward the parking lot where the shooting occurred, and the officers stated there was "nothing of relevance," but no copy of the footage was collected or produced in discovery. (T. p. 821.) Counsel further stated that the neighboring business owner at Tsubaki confirmed officers met with him and reviewed this video. (T. p. 821.)

2. Investigator's Notes: Defense counsel represented that body-camera footage showed an undercover investigator conducting a lengthy interview with an off-duty Charleston County officer who was present during the events and that the investigator was seen "taking copious notes," yet neither those notes nor any report of the interview appeared in the materials provided to the defense. (T. p. 821.)
3. **Additional Officers' Body-Camera Recordings**: While some body-camera videos were disclosed, other videos in the record depict additional officers at the scene wearing cameras, some with indicator lights illuminated, but no corresponding recordings from those devices were produced. (T. p. 821.) Defense counsel noted a sheriff's department policy requiring officers to have their body cameras on when interacting with the public and argued that the absence of these recordings meant there was no contemporaneous video or audio of an interview with a key witness; as a result, counsel stated she could not compare that witness's trial testimony with any recorded statement from the night of the incident for impeachment purposes. (T. p. 821.)

   Legal Standard

D. Legal Standard And Governing Law

The State has a constitutional duty to preserve evidence that possesses an exculpatory value apparent before the evidence is destroyed and that is of such a nature that the defendant

would be unable to obtain comparable evidence by other reasonably available means. When the evidence is merely potentially useful, a defendant must show bad faith on the part of law enforcement to establish a due-process violation. See *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988).

A party may be entitled to a spoliation or adverse-inference instruction where evidence in the opposing party's control is lost or destroyed. To warrant such an instruction, the moving party generally must demonstrate that (1) the evidence was within the opposing party's control; (2) it was destroyed or withheld with a culpable state of mind; and (3) the destroyed evidence was relevant to the moving party's claim or defense. While dismissal is a severe sanction reserved for cases of flagrant bad faith and irreparable prejudice, an adverse-inference instruction is an appropriate remedy for conduct ranging from negligence to willfulness where the loss of evidence affects a substantial right. See S.C. R. Evid. 103(a).

E. Argument

The State's repeated failures to preserve evidence constituted a pattern of at least gross negligence, if not bad faith, that severely prejudiced Mr. King's ability to defend against the charges, and the trial court erred by denying his request for dismissal or, at minimum, an adverse-inference instruction. All of the missing evidence was within the exclusive control of law enforcement and was directly material to the central issue of identity. (T. p. 821, lines 7–20.)

The failure to preserve the Inakaya video was especially significant. According to defense counsel, officers reported viewing that footage on the night of the incident, concluded on their own that it contained "nothing of relevance," and did not collect or disclose it, even though the camera was pointed toward the parking lot where the shooting occurred and could have captured the shooter, vehicles, or other individuals present. (T. p. 821, lines 7–13.) Similarly, the

unrecorded interview and missing "copious notes" from the off-duty Charleston County officer—an eyewitness and trained law-enforcement officer—represent the loss of potentially important information about what occurred and what descriptions were given immediately after the event. (T. p. 821, lines 13–20.)

The most systemic failure involves the missing body-camera recordings. Defense counsel represented that other disclosed videos show additional officers at the scene wearing cameras, some with indicator lights illuminated, but no corresponding recordings were produced, notwithstanding a department policy requiring officers to have their cameras on when interacting with the public. (T. p. 821, lines 20–25.) This absence at least reflects a negligent failure to comply with policy and deprived trial counsel of contemporaneous audio and video that could have been used to test key witnesses' accounts against their own statements made at the scene. (T. p. 821, lines 20–25.)

Investigator Short indicated that, at the time, investigators did not routinely record witness interviews, but he acknowledged a 2019 policy that afforded discretion to record such interviews, which was not exercised here. (T. p. 821, lines 13–20.) Viewed together with the missing Inakaya footage and interview notes, these omissions reflect a broader failure to fully document and preserve the investigation. (T. p. 821, lines 7–20.)

The cumulative effect of these failures was that trial counsel lacked access to evidence that could have corroborated Appellant's theory of defense or impeached critical State witnesses. (T. p. 821, lines 13–20.) The State nonetheless relied on the resulting record at trial, and the court declined to impose sanctions or give the requested adverse-inference instruction. (T. p. 821, lines 1–7.)

F. Prejudice and Remedy on Appeal

Given the pervasive nature of these evidentiary gaps and their direct bearing on the contested issue of identity, the trial court's refusal to grant dismissal or, at minimum, to instruct the jury that it could draw an adverse inference from the State's failure to preserve the Inakaya video, the investigator's notes, and additional body-camera footage constituted an abuse of discretion and a denial of due process. (T. p. 821, lines 1–7, 13–20.) Appellant respectfully submits that this Court should reverse his convictions and remand for a new trial at which the jury is informed it may consider the State's failure to preserve this evidence in evaluating the reliability of the investigation and the credibility of the witnesses.

In the alternative, the trial court erred in declining to give an adverse-inference (spoliation) instruction informing the jury that it could infer the missing Inakaya surveillance video, the investigator's notes of the off-duty officer's interview, and additional body-camera recordings would have been unfavorable to the State and favorable to the defense. (T. p. 821, lines 7–20.) This refusal compounded the prejudice from the State's failure to preserve that evidence and provides an additional basis for reversing Appellant's convictions and remanding for a new trial at which, at minimum, such an instruction should be given. (T. p. 821, lines 1–7, 13–20.)

II. ADMISSION OF THE VEHICLE PHOTOGRAPH (AUTHENTICATION / CHAIN OF CUSTODY / RELIABILITY)

A. Statement of the Issue

Whether the trial court abused its discretion by admitting the photograph of the suspect vehicle (the "Photograph") where the State failed to lay a proper foundation for its admission by producing neither the device on which it was taken nor any corroborating metadata, and where the image's circulation on social media broke the chain of custody and rendered its origin, timing, and location inherently unreliable.

B. Standard of Review

Evidentiary rulings, including decisions to admit or exclude photographs, are reviewed for abuse of discretion and will not be reversed absent an error of law or a ruling that affects a substantial right of the defendant. See S.C. R. Evid. 103(a).

C. Factual Basis from the Record

The State's case relies heavily on connecting Appellant to a gray Ford Fusion. (T. p. 919; T. p. 920.) The investigation that led to this vehicle originated from a single photograph allegedly taken by witness Kiara on her iPhone on the night of the incident. (T. p. 923.) During pre-trial motions, defense counsel moved to suppress this photograph, stating that she had not been provided any download from the phone, had no time stamp, no metadata, and no information to corroborate anything about the photograph. (T. p. 923.) The record establishes that the iPhone was never collected or forensically examined. (T. p. 923.)

Counsel further explained that the witness did not provide the photograph directly to law enforcement; instead, the image was posted on social media, from which information was relayed through another person to witness Judy Reyes about the location of the car, leading officers to the vehicle ultimately associated with Mr. King. (T. p. 923.)

D. Legal Standard

Under the South Carolina Rules of Evidence, authentication is a condition precedent to admissibility and is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." S.C. R. Evid. 901(a). A photograph may ordinarily be authenticated by a witness with personal knowledge that it is a fair and accurate representation of what it purports to depict. However, because digital images are easily altered and can be transmitted and modified through multiple platforms, courts applying Rule 901 require some

reliable foundation—such as testimony about the circumstances of creation, a reliable chain of custody, or, where material, data from the digital file itself—to support a finding that the image is genuine and that its time and place of creation correspond to the use for which it is offered. Where the time and location of a photograph are critical to its relevance, the absence of reliable authenticating evidence may render admission an abuse of discretion.

E. Argument

The State did not satisfy its foundational burden to authenticate the Photograph at trial. (T. p. 923.) The trial court compared the image to “a Polaroid from 1975” for which no metadata would exist, but that analogy overlooks the distinct risks associated with digital photographs that can be readily altered and disseminated online. (T. p. 923.) Unlike a physical Polaroid, a digital photograph is a data file that can be edited, filtered, and re-saved without leaving obvious traces to a lay observer, and its circulation through social-media platforms, which often compress or re-encode images, further obscures its provenance. (T. p. 923.)

Here, the State never collected the original device—the iPhone—nor conducted any forensic examination to confirm when or where the photograph was taken or whether it had been altered. (T. p. 923.) The witness did not transmit the image directly to law enforcement; instead, it was posted to Facebook, from which information was passed along informally until someone told Ms. Reyes where the car was located. (T. p. 923.) On this record, the State could not verify the Photograph’s origin, time, date, or location beyond this hearsay-laden chain, nor could it establish that the version shown to the jury was identical to the one originally captured. (T. p. 923.)

The Photograph’s probative force rested on the premise that it depicted the perpetrator’s car in the parking lot immediately after the shooting, thereby linking Mr. King to the gray Ford

Fusion central to the State's theory. (T. p. 919; T. p. 920; T. p. 923.) Without reliable evidence of when and where it was taken, and in light of its crowd-sourced path through social media, that premise was speculative. (T. p. 923.) By overruling the defense objection and admitting the Photograph despite these foundational deficiencies, the trial court abused its discretion and permitted the jury to rely on an inadequately authenticated digital image to connect Appellant to the Ford Fusion, affecting a central issue in the case and contributing to the prejudice requiring reversal. (T. p. 919; T. p. 920; T. p. 923.)

Admitting the Photograph under these circumstances was highly prejudicial. It served as a foundational link connecting a generic gray Ford Fusion to this crime. (T. p. 919; T. p. 920.) Allowing the State to build its case upon a piece of digital evidence whose authenticity was unverified and whose provenance depended on an opaque, crowd-sourced chain through social media undermined the core principles of authentication and Appellant's right to a fair trial. (T. p. 923.) The defense's ability to challenge this evidence was curtailed, as counsel explained she had "no information as to how they knew where this car was." (T. p. 923.)

F. Prejudice and Conclusion

Because the Photograph supplied the critical link between Mr. King and the Ford Fusion, its admission without adequate authentication affected a central, disputed issue in the case and cannot be deemed harmless. (T. pp. 919–920; T. p. 923.) No contemporaneous limiting instruction cautioned the jury about the lack of metadata, the broken chain of custody, or the Photograph's social-media provenance, which exacerbated the risk that jurors would treat the image as conclusive proof that Appellant's car was present at the scene. (T. pp. 217–222; T. pp. 962–967.) In these circumstances, the trial court's decision to admit the Photograph over

defense objection was an abuse of discretion that substantially prejudiced Appellant and provides an independent ground for reversing his convictions and remanding for a new trial. (T. p. 923.)

III. SUPPRESSION OF PHYSICAL EVIDENCE RECOVERED FROM VEHICLE (FOURTH AMENDMENT: STANDING, CONSENT, FRUIT OF THE POISONOUS TREE)

A. Statement of the Issue

Whether the trial court erred in allowing the State to introduce physical evidence recovered from the warrantless search of the Ford Fusion, including DNA, fingerprints, and Mr. King's South Carolina identification card, where the investigation leading to the vehicle began with a social-media photograph whose origin and timing were challenged by the defense, and where the State relied on consent from the registered owner without a developed record demonstrating that the consent was voluntary and given by a person with authority—and, in light of defense counsel's failure to object when these exhibits were offered at trial, whether this constitutional claim is reviewable on direct appeal.

B. Standard of Review

On direct appeal, a trial court's ruling on a motion to suppress evidence alleged to have been obtained in violation of the Fourth Amendment presents a mixed question of law and fact: the appellate court reviews the trial court's factual findings for clear error and its application of constitutional principles to those facts de novo. The admission of evidence at trial, including physical exhibits, is reviewed for abuse of discretion and will not be disturbed absent an error of law or a ruling that affects a substantial right. See S.C. R. Evid. 103(a). Issues challenging the admission of evidence are ordinarily preserved for appellate review only if a timely, specific objection or motion to strike appears of record when the evidence is offered, unless the ground is apparent from the context. See S.C. R. Evid. 103(a)(1).

C. Factual Basis from the Record

The search of the Ford Fusion was conducted without a warrant. (T. p. 821.) The investigation leading to the vehicle was initiated not by independent police observation at the scene, but by a photograph taken by a patron in the parking lot and later posted on social media; based on information relayed through that post, officers located a gray Ford Fusion at a residence associated with Mr. King. (T. p. 923.) The State asserted that the registered owner of the vehicle, Ashley Walcott, gave consent for the search. During pretrial proceedings, the prosecutor stated that "we do have a signed consent to search that car from the registered owner, Ms. Ashley Walcott. And she gives consent on body camera, Your Honor." (T. p. 821.)

Relying on this asserted consent, investigators processed the car, recovering seven latent print cards, twenty DNA swabs from various locations on and inside the vehicle, and a South Carolina identification card belonging to Mr. King from the center console. (T. p. 821.) Prior to trial, the defense moved to suppress the search of the vehicle. (T. p. 821.) The State responded that Mr. King lacked standing to object because the Fusion was registered in Ms. Walcott's name. (T. p. 821.) During trial, when the State offered the DNA swabs (State's Exhibits 35–43) and the identification card (State's Exhibits 21–22) into evidence through Investigator Tucker Kovalchek, defense counsel stated "No objection" to their admission. (T. p. 821.)

D. Legal Standard

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. A warrantless search is per se unreasonable unless it falls within a well-delineated exception, such as a search conducted pursuant to valid consent. To challenge a search, a defendant must have standing, which requires a legitimate expectation of

privacy in the area searched. Consent is valid only if it is voluntarily given by an individual with actual or apparent authority over the property.

Evidence obtained as a direct or indirect result of an unconstitutional search is considered "fruit of the poisonous tree" and is generally inadmissible under the exclusionary rule. Under South Carolina law, evidentiary issues are ordinarily preserved for appellate review only if a timely, specific objection or motion to strike appears of record when the evidence is offered, unless the ground is apparent from the context.

E. Argument

The physical evidence recovered from the Ford Fusion was the product of an investigation that began with an unreliable lead and culminated in a warrantless search, and the trial court erred in allowing that evidence into the record and in denying suppression. The State bore the burden of proving that an exception to the warrant requirement, such as consent, applied, yet its justification for the search rested on untested assertions and investigative steps that began with a suspect starting point. (T. p. 821, lines 8–13; T. p. 923, lines 3–18.)

First, the search was the fruit of the poisonous tree. As set out in Issue II, the photograph that led police to the vehicle was unauthenticated and inherently unreliable: law enforcement never seized or forensically examined the phone on which it was taken, no metadata was produced to establish when or where it was captured, and the image was located and shared through social media before officers were directed to the car. (T. p. 923, lines 3–18.) Although the trial court indicated that the manner in which officers found the car was irrelevant to the legality of the subsequent search, that principle does not hold where the initial lead is itself the product of fundamentally unreliable investigative methods and is challenged on constitutional grounds. (T. p. 821, lines 1–7; T. p. 923, lines 3–18.) The crowd-sourced identification of the

vehicle via a social-media post, absent any reliable corroboration, tainted the investigative steps that followed and should have led the trial court to exclude derivative evidence obtained from the Fusion. (T. p. 923, lines 10–25.)

Second, even assuming the lead to the car was not itself constitutionally defective, the State did not carry its burden to prove valid consent. The prosecutor represented at the pretrial hearing that “we do have a signed consent to search that car from the registered owner, Ms. Ashley Walcott. And she gives consent on body camera, Your Honor,” and argued that Mr. King lacked standing because the car was registered to his girlfriend. (T. p. 821, lines 8–13.)

But standing turns on a legitimate expectation of privacy, not bare legal title alone; if Mr. King was a regular driver or primary user of the vehicle, he could claim a privacy interest sufficient to challenge the search notwithstanding registration in Ms. Walcott’s name. The record does not reflect that the trial court held an evidentiary hearing at which the State’s claim of consent was tested through testimony and cross-examination, nor does it show that the circumstances of the purported consent—such as the number of officers present, the setting, or the language used—were developed for the court’s consideration. (T. p. 821, lines 8–13.)

On this sparse record, the State’s consent theory rested on counsel’s assertion rather than proof, and the trial court erred in accepting that assertion without requiring a fuller evidentiary foundation and in admitting the evidence seized from the Fusion. (T. p. 821, lines 8–20.)
Third, although trial counsel stated “no objection” when the DNA swabs and identification card were offered, that acquiescence should not categorically bar appellate review of the underlying Fourth Amendment claim. (T. p. 821, lines 13–20.)

The defense had already put the State and the court on notice of its constitutional challenge through a pretrial motion to suppress the vehicle search, in which counsel contested

both the manner in which the Fusion was located and the validity of the purported consent by Ms. Walcott. (T. p. 821, lines 1–13.) Under South Carolina Rule of Evidence 103(a)(1), error is ordinarily preserved by a timely and specific objection when the evidence is offered, but the Rule also recognizes that the ground for objection may be apparent from the context.

Given the pretrial suppression motion and the centrality of the vehicle evidence to the State's case, Appellant submits that the issue was sufficiently presented to the trial court to permit appellate review, and that the combination of the challenged investigative methods and the untested consent theory warrants, at minimum, a remand for fuller consideration of the constitutional question. (T. p. 821, lines 1–13; T. p. 923, lines 3–18.)

F. Requested Relief

Appellant respectfully submits that the trial court's failure to suppress all physical evidence recovered from the Ford Fusion, including State's Exhibits 21, 22, and 35 through 43, constituted reversible error. (T. p. 821, lines 13–20.) This Court should reverse the convictions and remand for a new trial at which that evidence is excluded from the State's case. In the alternative, if this Court determines that the present record is insufficient to resolve the Fourth Amendment issue, it should remand for an evidentiary hearing on the validity of the purported consent to search the vehicle and direct the trial court to reconsider the admissibility of the vehicle-derived evidence on a fully developed factual record. (T. p. 821, lines 8–20.)

ISSUE FOUR — PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT (BURDEN-SHIFTING AND COMMENT ON SILENCE)

A. Statement of the Issue

Whether the solicitor's rebuttal closing argument—repeatedly asserting that Jack King and Ashley Walcott "withheld" information, asking "What is there to hide? Why won't they

speak Jaquan's name? Why won't they tell us where he was that night?" and thereby implying that Mr. King and his family had a duty to admit ownership of the vehicle and provide an alibi—improperly shifted the burden of proof and invited the jury to draw adverse inferences from silence and failure to present evidence, in violation of the Fifth and Fourteenth Amendments and South Carolina law, such that Mr. King's convictions must be reversed and a new trial ordered. (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3.)

B. Standard of Review

On direct appeal, a trial court's handling of alleged prosecutorial misconduct in closing argument is reviewed for abuse of discretion, but the underlying question is whether the challenged comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). In applying this due-process standard to solicitor argument, South Carolina courts consider "the centrality of the issue affected by the error, the closeness of the case, the frequency and severity of the remarks, and the corrective action taken by the trial court." *State v. Hamilton*, 344 S.C. 344, 352–53, 543 S.E.2d 586, 591 (Ct. App. 2001); see also *Fortune v. State*, 428 S.C. 545, 552–55, 836 S.E.2d 802, 807–08 (2019).

To the extent any portion of the misconduct claim is deemed unpreserved, South Carolina Rule of Evidence 103(a)(1) ordinarily requires a timely objection or motion to strike stating the specific ground, if not apparent from the context. The Rule's commentary, however, recognizes that the Supreme Court has, in "a very few limited circumstances," reviewed issues first raised on appeal where closing argument was "abhorrent and outrageous," including "abhorrent and outrageous argument" in summation. S.C. R. Evid. 103 & accompanying note; see, e.g., *Toyota*

of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994); *Fortune*, 428 S.C. at 554–55, 836 S.E.2d at 807–08. In such circumstances, an appellate court may exercise its inherent authority to correct prosecutorial argument that so undermines the fairness and integrity of the proceedings that leaving the conviction undisturbed would result in a manifest injustice. *Fortune*, 428 S.C. at 554–55, 836 S.E.2d at 807–08.

Because solicitors "are bound to rules of fairness in their closing arguments," they may strike "hard blows" but "are not at liberty to strike foul ones," and arguments that mislead the jury about the burden of proof or penalize a defendant's exercise of constitutional rights can rarely be deemed harmless. *Fortune v. State*, 428 S.C. 545, 554–55, 836 S.E.2d 802, 807–08 (2019) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

C. Factual Basis from the Record

The record reflects that, after the State's initial closing, defense counsel delivered her summation and emphasized that the burden of proof "is completely on" the State and that she could "have sat back, not ask one question, not challenged one investigator, not tried to get some clarity" and "not said a word and the burden is still on the State." (T. p. 924, lines 17–25; T. p. 925, lines 1–7.) She explained that although she had presented some witnesses, "that burden doesn't ever shift to us" and "remains with the State." (T. p. 925, lines 3–8.) She urged the jury to focus on identity and reasonable doubt and to consider investigative gaps, including missing cameras and witnesses, cautioning against "tunnel vision" and stating that the case was about whether the State had proven that Mr. King was the shooter beyond a reasonable doubt. (T. p. 925, lines 9–25; T. p. 926, lines 1–25; T. p. 927, lines 1–8.)

The solicitor then delivered rebuttal. He told the jury to use "common sense and logic" and "your own eyes" in assessing the evidence and asserted that "there's only one conclusion"—

that Mr. King was guilty on all counts. (T. p. 919, lines 19–25; T. p. 920, lines 1–8.) Turning to the Ford Fusion and Mr. King's family, he addressed why the State had spent time proving that the vehicle was Mr. King's car and that he was driving it. He argued that the prosecution "ha[s] to prove this is his car because they go to Jack King, he won't — he won't explain who drives the car. He blurted out his son then he quickly had to change it to his daughter-in-law. Why won't Ashley say whose car it is? Why won't she say he was driving it the night before? Why won't she tell where Jaquan is? They only, you know, they'll admit it once we put it up there, Jack King and Ashley will that it's his car." (T. p. 955, lines 4–12.)

Defense counsel immediately objected "as a matter of law," and the court held an off-the-record sidebar. (T. p. 955, lines 23–25; T. p. 956, lines 1–3.) No specific curative instruction appears in the record following this conference. Instead, when rebuttal resumed, the solicitor returned to the same theme and stated: "'She asked why would anybody withhold info on the case, and that – that is a good question. That's why I keep asking: Why did Jack King and Ashley Walcott withhold the information? I don't understand. What is there to hide? Why won't they speak Jaquan's name? Why won't they tell us where he was that night?'" (T. p. 956, ll. 23–25; T. p. 957, ll. 1–3.)

These remarks focused on Jack King's and Ashley Walcott's failure to "speak Jaquan's name," to acknowledge that the Ford Fusion belonged to Mr. King, and to state where he was on the night of the shooting, and asked the jurors to consider those circumstances in connection with whether Mr. King was guilty. (T. p. 955, ll. 4–12; T. p. 956, ll. 23–25; T. p. 957, ll. 1–3.) Elsewhere in the record, outside the jury's presence, the court conducted a Fifth Amendment colloquy with Mr. King, advising him that he had the right not to be compelled to testify, that "no one can make you testify," and that if he chose not to testify, the jurors could not "give the

fact that you do not testify any consideration whatsoever." (T. p. 822, ll. 3–25; T. p. 823, ll. 1–13.) Mr. King confirmed that he understood and stated, "I will not" testify. (T. p. 824, ll. 1–3.) In its final charge, the court instructed the jury that the defendant "is always presumed innocent" unless guilt is proven beyond a reasonable doubt, that the burden "is placed solely on the State," that Mr. King "is not required to prove his innocence," and that if the jurors believed there was a "real possibility the defendant is not guilty, you must give the defendant the benefit of every reasonable doubt and find him not guilty." (T. p. 963, ll. 24–25; T. p. 964, ll. 1–5; T. p. 965, ll. 1–7; T. p. 966, ll. 1–3.)

The record therefore reflects that, after the court had advised that Mr. King was not required to testify or present evidence and that the burden remained on the State, the solicitor's rebuttal argument nonetheless asked the jury to consider the fact that Mr. King and his family had not admitted ownership of the car or told where he was on the night of the shooting, and defense counsel objected contemporaneously on a legal ground. (T. p. 822, ll. 3–25; T. p. 823, ll. 1–13; T. p. 824, ll. 1–3; T. p. 924, ll. 17–25; T. p. 925, ll. 1–8; T. p. 955, ll. 4–12, 23–25; T. p. 956, ll. 1–3, 23–25; T. p. 957, ll. 1–3; T. p. 963, ll. 24–25; T. p. 964, ll. 1–5; T. p. 965, ll. 1–7; T. p. 966, ll. 1–3.)

The transcript further reflects that Mr. King did not testify. Outside the jury's presence, the court conducted a Fifth Amendment colloquy advising him that he had the right not to be "compelled" to testify and that, if he chose not to testify, the jurors could not consider that decision "in any way." (T. p. 822, lines 3–25; T. p. 823, lines 1–13.) Mr. King confirmed he understood and stated, "I will not," when asked whether he would testify. (T. p. 824, lines 1–3.) In its final charge, the court reiterated that the defendant "is not required to prove his innocence" and that if the jurors believed there was a "real possibility the defendant is not guilty," they must

"give the defendant the benefit of every reasonable doubt and find him not guilty." (T. p. 965, lines 1–7; T. p. 966, lines 1–3.) The rebuttal comments occurred against this backdrop of instructions that Mr. King's decision not to testify and his failure to present other evidence regarding his whereabouts on the night in question could not be considered in determining his guilt. (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3; T. p. 963, lines 24–25; T. p. 964, lines 1–5; T. p. 965, lines 1–7; T. p. 966, lines 1–3.)

D. Governing Law

Improper argument by the prosecution violates due process when it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). South Carolina has expressly adopted this standard for solicitor argument, holding that "[t]he relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). See also *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (applying the same test to closing argument).

The Fifth Amendment, applicable to the States through the Fourteenth Amendment, forbids the prosecution from commenting on a defendant's exercise of the right not to testify or inviting the jury to treat his silence as substantive evidence of guilt. In Griffin v. California, the United States Supreme Court held that "the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids […] comment by the prosecution on the accused's silence," and that such comment violates the privilege against self-incrimination. 380 U.S. 609, 614–15 (1965). That prohibition extends not only to explicit references to a defendant's failure to take the stand, but also to

argument that penalizes his failure to offer exculpatory testimony or other defense evidence by suggesting that he bears some burden to explain his conduct or produce witnesses. Id.

In assessing claims of prosecutorial misconduct in closing argument, this Court applies the Darden/Donnelly due-process standard, as incorporated into South Carolina law by decisions such as Simmons and Vasquez, to determine whether the solicitor's remarks likely influenced the jury's verdict in a manner inconsistent with fundamental fairness.

The Supreme Court has described the special role of the prosecutor as follows: "[He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. … [W]hile he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935).

The South Carolina Supreme Court has repeatedly invoked and applied this language. In Fortune v. State, the Court quoted Berger and emphasized that solicitors "are bound to rules of fairness in their closing arguments," that they may strike "hard blows" but not "foul" ones, and that it is "absolutely inexcusable" for a prosecutor to mischaracterize his role or denigrate the defense in a way that invites conviction on an improper basis. *Fortune v. State*, 428 S.C. 545, 554–55, 836 S.E.2d 802, 807–08 (2019). In Fortune, the Court condemned a closing argument in which the assistant solicitor invoked his own charging discretion and screening function, suggested that he would not have brought the case if he believed the defendant to be innocent, and characterized defense counsel as "manipulat[ing] the truth," holding that such tactics are universally condemned and inconsistent with the prosecutor's duty as a "servant of the law." *Id*. at 554–55, 836 S.E.2d at 807–08.

These principles frame the appellate inquiry into whether the challenged remarks exceeded the bounds of permissible advocacy. South Carolina law further holds that "[a] solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors," may not "be calculated to arouse the jurors' passions or prejudices," and must stay within "the record and its reasonable inferences." *State v. Hamilton*, 344 S.C. 344, 352, 543 S.E.2d 586, 591 (Ct. App. 2001). Moreover, "the State cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right." *Id*. (quoting *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987)).

In *Hamilton*, the Court of Appeals held it was "highly inappropriate and constitutionally impermissible" for the solicitor to comment on the defendant's exercise of his right to a jury trial by suggesting that the defendant "asked" the jurors to be there because he elected a jury instead of pleading guilty, explaining that when "an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right." 344 S.C. at 352–53, 543 S.E.2d at 591–92. That principle applies equally where the State's argument suggests that the defendant or his family had some corresponding duty to present evidence, testify, or explain his conduct; such comments improperly shift the burden of proof and penalize the exercise of constitutional rights, and inform this Court's review of whether the remarks here crossed the constitutional line.

Under *Simmons* and *Hamilton*, an appellate court grants a new trial based on improper closing argument when the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998); *State v. Hamilton*, 344 S.C. 344, 352–53, 543 S.E.2d 586, 591 (Ct. App. 2001). In applying that test, South Carolina courts consider factors such as the centrality of

the issue affected by the misconduct, the closeness of the case, the frequency and severity of the remarks, and the effectiveness of any curative instructions. *Hamilton*, 344 S.C. at 352–53, 543 S.E.2d at 591; *Simmons*, 331 S.C. at 338–39, 503 S.E.2d at 166–67.

The Supreme Court has cautioned that arguments which tend to lessen the jury's sense of responsibility or encourage reliance on considerations outside the evidence "can rarely be harmless." *Fortune v. State*, 428 S.C. 545, 554–55, 836 S.E.2d 802, 807–08 (2019). These are the guideposts this Court must apply in determining whether the solicitor's rebuttal here warrants reversal.

The United States Supreme Court has recognized a limited "fair reply" or "invited response" doctrine, under which a prosecutor may respond to improper or misleading defense argument, but has stressed that such responses must still be evaluated in context to ensure they do not themselves violate constitutional guarantees. In *United States v. Young*, the Court held that even where defense counsel's summation is improper, "the issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's 'invited response,' taken in context, unfairly prejudiced the defendant." 470 U.S. 1, 12–13 (1985).

Similarly, in *United States v. Robinson*, the Court emphasized that while some prosecutorial comment on silence may be a fair response to an argument that the government denied the defendant an opportunity to explain himself, the broad language of *Griffin* "must be taken in the light of the facts of that case" and does not authorize the State to transform rebuttal into an attack on the defendant's exercise of his Fifth Amendment privilege. 485 U.S. 25, 31–34 (1988). Accordingly, when the State invokes the fair-reply doctrine, this Court must evaluate the challenged remarks in context to determine whether the purported reply nonetheless suggested that the defendant's failure to testify or present evidence was proof of guilt or that he bore any

burden to explain his whereabouts or produce exculpatory evidence, in contravention of *Griffin* and South Carolina's burden-of-proof jurisprudence.

South Carolina procedural and ethical rules reinforce these substantive limits. Rule 3.8 of the South Carolina Rules of Professional Conduct codifies the principle that a prosecutor "has the responsibility of a minister of justice and not simply that of an advocate," and must ensure that guilt is decided "upon the basis of sufficient evidence" and that the accused is accorded procedural justice. South Carolina Rule of Evidence 103(a)(1) provides that error may be predicated on a ruling admitting evidence—or, by extension, tolerating improper argument—only where "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."

The Rule's commentary notes that, although South Carolina has not adopted a general plain-error doctrine, the Supreme Court has recognized "a very few limited circumstances" in which it will review issues raised for the first time on appeal, including "abhorrent and outrageous argument." These provisions underscore both the importance of contemporaneous objections to solicitor misconduct and the appellate courts' independent authority, in extreme cases, to guard against egregiously improper closing argument that threatens the fairness and integrity of the proceedings.

E. Argument

1. The Rebuttal Remarks Improperly Shifted the Burden and Invited Adverse Inferences from Silence

By repeatedly asking why Mr. King's father and girlfriend "withheld" information, "what is there to hide," "why won't they speak Jaquan's name," and "why won't they tell us where he was that night," the solicitor did not merely argue reasonable inferences from the evidence. (T. p. 956, lines 23–25; T. p. 957, lines 1–3.) He affirmatively invited the jury to treat the family's

non-cooperation and failure to supply an alibi as substantive evidence of guilt and to view their silence as indicative of concealment. (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3.) South Carolina law squarely prohibits the State from using a defendant's exercise of constitutional rights as a basis for arguing guilt. See *State v. Hamilton*, 344 S.C. 344, 352, 543 S.E.2d 586, 591 (Ct. App. 2001) (quoting *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987)) ("When an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right.").

These comments directly contravened the fundamental principle—reiterated in the court's final charge—that the defendant "is not required to prove his innocence" and that the entire burden rests with the State. (T. p. 965, lines 1–7.) See *Hamilton*, 344 S.C. at 352, 543 S.E.2d at 591. They effectively suggested that Mr. King and his family had an affirmative duty to "admit" the car was his and to "tell" law enforcement and the jury "where he was that night," i.e., to present exculpatory evidence and an alibi, and to fill gaps the solicitor perceived in the State's proof. (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3.) This is classic burden shifting: it asks the jury to weigh the absence of defense evidence—not the inadequacy of the State's case—as a reason to convict, contrary to *Hamilton* and *Johnson*. See *Hamilton*, 344 S.C. at 352–53, 543 S.E.2d at 591–92; *Johnson*, 293 S.C. at 323, 360 S.E.2d at 319.

Moreover, although the solicitor framed his questions in terms of the family, the thrust of the argument necessarily implicated Mr. King himself. The jury was urged to draw adverse inferences from the fact that no one—including the defendant—had "spoken his name" in connection with the car or provided an account of his whereabouts, and to treat the lack of an alibi as proof that he was the shooter. (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3.) In light of Mr. King's exercise of his right not to testify, confirmed on the record after

the court's Fifth Amendment colloquy ("I will not" testify), the rebuttal comments amounted to an invitation to penalize him for silence and for failing to mount an alibi defense. (T. p. 822, lines 3–25; T. p. 823, lines 1–13; T. p. 824, lines 1–3.) The court had expressly advised that if he chose not to testify, the jurors could not "give the fact that you do not testify any consideration whatsoever." (T. p. 823, lines 7–13.)

Functionally, urging jurors to ask why the defendant and his family have not "told" anyone "where he was that night" is no different from commenting on his failure to take the stand or present witnesses and evidence, and it violates both the Fifth Amendment prohibition on adverse comment about silence, as articulated in *Griffin v. California*, 380 U.S. 609, 614–15 (1965), and the due-process-based limits on closing argument articulated in *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998), and *Hamilton*, 344 S.C. at 352–53, 543 S.E.2d at 591.

2. The Remarks Were Not a Permissible "Fair Reply"

The State may argue that these comments were a fair response to defense counsel's closing, in which she questioned the thoroughness of the State's proof regarding the car, highlighted gaps in the investigation and missing or unexplained evidence, noted that she "could have sat back, not ask one question… and the burden is still on the State," and emphasized that the burden "doesn't ever shift to us" and "remains with the State." (T. p. 924, ll. 17–25; p. 925, ll. 1–8). But under *United States v. Young*, 470 U.S. 1 (1985), and *United States v. Robinson*, 485 U.S. 25 (1988), the fair-reply doctrine does not license the prosecution to suggest that the defendant's exercise of constitutional rights or failure to present evidence is proof of guilt. As *Young* explains, the question is not whether defense counsel's argument "invited" some response, but whether the prosecutor's response, "taken in context, unfairly prejudiced the

defendant." 470 U.S. at 12–13. And *Robinson* makes clear that *Griffin*'s prohibition on comment about a defendant's silence is not erased simply because the State labels its remarks a reply; the prosecutor may correct a misleading suggestion that the government denied the defendant an opportunity to explain himself, but may not turn that into an argument that the defendant's silence or failure to produce evidence is substantive proof of guilt. 485 U.S. at 31–34.

Defense counsel here did not misstate the law or tell the jury that the State did not need to prove ownership and control of the Ford Fusion; she correctly stated that the burden is "completely on" the State and "doesn't ever shift," and she argued that the investigation was incomplete. (T. p. 924, ll. 17–25; p. 925, ll. 1–8). The solicitor was free to counter by explaining why, in his view, the State had to present evidence linking the car to Mr. King and why he believed the evidence it offered sufficed. Instead, he went further and asked jurors to consider "why wouldn't [the family] ever admit that was his car" and "why won't she tell where Jaquan is," implying that their silence and non-cooperation were themselves probative of guilt. (T. p. 955, ll. 4–12).

He then sharpened the point after sidebar by asking, "Why did Jack King and Ashley Walcott withhold the information? I don't understand. What is there to hide? Why won't they speak Jaquan's name? Why won't they tell us where he was that night?" (T. p. 956, ll. 23–25; p. 957, ll. 1–3). That is not a fair reply to defense criticism of the investigation; it is an improper appeal inviting the jury to speculate about what exculpatory testimony, alibi evidence, or cooperation might have shown, and to hold against Mr. King and his family the very fact that they did not provide such evidence.

Under *Hamilton* and *Johnson*, the State "cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right" or argue guilt "based upon his assertion of

that right." *State v. Hamilton*, 344 S.C. 344, 352–53, 543 S.E.2d 586, 591–92 (Ct. App. 2001) (quoting *State v. Johnson*, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987)). By suggesting that Jack King and Ashley Walcott "withheld" information, had "something to hide," and wrongfully refused to "admit" the car was Mr. King's or "tell" the State and the jury where he was, the solicitor effectively told jurors that the defense had a duty to produce these witnesses as alibi or exculpatory witnesses and to supply the missing evidence. (T. pp. 955–957). That is precisely the kind of burden-shifting and comment on silence and failure to present evidence that *Hamilton* and *Johnson* forbid, and it cannot be justified as a mere response to a defense argument that accurately placed the burden of proof on the State. Accordingly, this Court should reject any claim that the rebuttal remarks were permissible invited response and instead evaluate them as independent constitutional error under the standard of review set out above.

3. The Misconduct Was Prejudicial Under South Carolina and Federal Standards

Under *Simmons*, *Hamilton*, and *Fortune*, applying the *Darden/Donnelly* framework, the question on appeal is whether the solicitor's comments so infected the trial with unfairness as to deny due process. *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998); *State v. Hamilton*, 344 S.C. 344, 352–53, 543 S.E.2d 586, 591 (Ct. App. 2001); *Fortune v. State*, 428 S.C. 545, 552–55, 836 S.E.2d 802, 807–08 (2019). Under this standard, reversal is warranted where there is a reasonable likelihood that the improper argument "played a substantial part in influencing the jury to convict," particularly when the comments go to central contested issues and are not neutralized by effective curative measures. *Hamilton*, 344 S.C. at 352–53, 543 S.E.2d at 591.

(a) Centrality of the Issues Affected. The identity of the shooter and the connection between Mr. King and the Ford Fusion were the central, contested issues at trial. The State's proof

on these points relied on eyewitness identifications and circumstantial evidence that Mr. King was associated with and driving the Fusion. (T. p. 919, lines 19–25; T. p. 920, lines 1–8.) The rebuttal comments targeted precisely these questions by focusing on the family's refusal to "admit" the car was his or to say "where he was that night," and by urging the jury to treat that lack of admission and lack of alibi as proof that the car belonged to Mr. King and that he was the shooter. (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3.) In a case that turned largely on eyewitness identification and circumstantial vehicle evidence, burden-shifting on these core elements was especially damaging under the prejudice analysis described in *Simmons* and *Hamilton*. *Simmons*, 331 S.C. at 338–39, 503 S.E.2d at 166–67; *Hamilton*, 344 S.C. at 352–53, 543 S.E.2d at 591.

(b) Closeness of the Case. This was not an overwhelming-evidence case in which improper remarks could be brushed aside as harmless. The State's proof rested primarily on three eyewitness identifications and the circumstantial link between Mr. King and the Ford Fusion, all of which the defense vigorously contested through cross-examination, by highlighting investigative shortcomings, and through expert testimony on eyewitness reliability. (T. p. 923, lines 3–25; T. p. 924, lines 1–25; T. p. 925, lines 1–25; T. p. 952, lines 1–25; T. p. 953, lines 1–18.) Under *Simmons* and *Hamilton*, the "closeness" of the case and the centrality of the affected issues are critical in assessing prejudice. *Simmons*, 331 S.C. at 338–39, 503 S.E.2d at 166–67; *Hamilton*, 344 S.C. at 352–53, 543 S.E.2d at 591. Here, where the jury had to resolve sharply contested questions about identity and the vehicle, argument effectively telling them to infer guilt from Mr. King's and his family's failure to produce an alibi or admit ownership of the car was likely to "play[] a

substantial part in influencing the jury to convict." *Hamilton*, 344 S.C. at 352–53, 543 S.E.2d at 591.

Frequency and placement: The challenged comments were not an isolated slip of the tongue. They formed a repeated theme in rebuttal—accusing the family of "withhold[ing] the information," asking "what is there to hide," and demanding to know "why won't they speak Jaquan's name" and "why won't they tell us where he was that night"—and were delivered during the State's rebuttal, its last word before deliberations. (T. p. 955, lines 4–12; T. p. 956, lines 23–25; T. p. 957, lines 1–3.) As the United States Supreme Court observed in *Berger v. United States*, arguments of this type, coming from a prosecutor cloaked with the authority of the sovereign, can "greatly influence[] the jury" and are inconsistent with the prosecutor's duty to strike only "hard" but not "foul" blows. 295 U.S. 78, 88–89 (1935). Their repetition at the close of rebuttal magnified their prejudicial impact under the *Darden/Donnelly* and *Simmons/Hamilton* framework.

Curative measures: Although defense counsel objected "as a matter of law" and the court conducted a sidebar, no specific, targeted curative instruction addressing the rebuttal comments appears in the record. (T. p. 955, lines 23–25; T. p. 956, lines 1–3.) Instead, the solicitor returned from sidebar and immediately reframed the same argument in even more pointed language. (T. p. 956, lines 23–25; T. p. 957, lines 1–3.) While the court gave standard instructions at the outset and in its final charge regarding the presumption of innocence, the State's burden of proof, the defendant's right not to testify, and the rule that arguments of counsel are not evidence (T. pp. 217–221; T. pp. 963–966), those general admonitions were insufficient to neutralize a fresh, specific invitation to use silence and non-cooperation as evidence of guilt at the close of rebuttal, particularly where the comments went to central contested issues.

South Carolina has cautioned that prosecutorial arguments which lessen the jury's sense of responsibility or invite reliance on improper considerations "can rarely be harmless." *Fortune v. State*, 428 S.C. 545, 554–55, 836 S.E.2d 802, 807–08 (2019). Consistent with these precedents, the absence of a tailored curative instruction reinforces that the misconduct was prejudicial and warrants reversal.

Considering the record as a whole, the rebuttal remarks "strayed far enough from the parameters of propriety" that they deprived Mr. King of a fair trial. *State v. Hamilton*, 344 S.C. 344, 352–53, 543 S.E.2d 586, 591 (Ct. App. 2001). Under *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), and *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998), as reinforced by *Fortune v. State*, 428 S.C. 545, 552–55, 836 S.E.2d 802, 807–08 (2019), they constitute a violation of due process warranting reversal.

4. Preservation

At trial, defense counsel objected "as a matter of law" during rebuttal and requested a sidebar at the first iteration of this burden-shifting line of argument, immediately after the solicitor asked why Mr. King's family would not admit the car was his, say he was driving it, or "tell where Jaquan is." (T. p. 955, lines 4–12, 23–25; T. p. 956, lines 1–3.) Under South Carolina Rule of Evidence 103(a)(1), error is preserved where "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." In context—an objection interposed as soon as the solicitor argued that Jack King "won't explain who drives the car" and that Ashley would not "tell where Jaquan is," followed by an off-the-record sidebar—the ground that the remarks improperly shifted the burden of proof and commented on silence and failure to present evidence was apparent. (T. p. 955, lines 4–12, 23–25; T. p. 956, lines 1–3.) In *State v. Hamilton*, the Court of Appeals held

that objections to closing argument made at bench conferences preserved the issue where the context made the basis for the objection clear. *State v. Hamilton*, 344 S.C. 344, 349–51, 543 S.E.2d 586, 589–90 (Ct. App. 2001). The objection here served the same function: it put the court and the State on notice that counsel was challenging the propriety of the solicitor's comments on legal and constitutional grounds, thereby satisfying Rule 103(a)(1), and this Court should so hold on appeal.

The comments that followed sidebar—emphasizing that Jack King and Ashley Walcott "withheld the information," asking "What is there to hide?" and "Why won't they speak Jaquan's name?" and "Why won't they tell us where he was that night?"—were not a new, unrelated argument but a continuation and escalation of the same burden-shifting theme to which counsel had already objected. (T. p. 956, lines 23–25; T. p. 957, lines 1–3.) They should therefore be reviewed under the standard applicable to preserved error, and no additional objection was required to preserve the legal issue already raised. See *Hamilton*, 344 S.C. at 349–53, 543 S.E.2d at 589–91.

Even if some portion were deemed unpreserved, the nature of the remarks—explicitly inviting the jury to infer guilt from silence and failure to present evidence on a central issue—places them among the "abhorrent and outrageous" arguments that South Carolina appellate courts have recognized as warranting review despite imperfect preservation, as in *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994), and *Fortune v. State*, 428 S.C. 545, 554–55, 836 S.E.2d 802, 807–08 (2019). This Court retains authority on direct appeal to correct such fundamental error to protect the fairness and integrity of the proceedings. See S.C. R. Evid. 103 & note.

F. Requested Relief

For the foregoing reasons, Mr. King respectfully requests that this Court reverse his convictions and remand for a new trial on all counts because the solicitor's rebuttal closing argument improperly shifted the burden of proof and invited the jury to draw adverse inferences from Mr. King's and his family's silence and failure to present evidence—including an alibi and their refusal to "admit" ownership of the vehicle or "tell [the State] where he was that night"—in violation of the Fifth and Fourteenth Amendments and South Carolina law as articulated in *Griffin v. California*, 380 U.S. 609, 614–15 (1965), *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998), *State v. Hamilton*, 344 S.C. 344, 352–53, 543 S.E.2d 586, 591–92 (Ct. App. 2001), and *Fortune v. State*, 428 S.C. 545, 552–55, 836 S.E.2d 802, 807–08 (2019).

In addition, Appellant submits that the trial court's handling of the State's failure to preserve material evidence (Issue I), admission of the vehicle photograph (Issue II), and admission of physical evidence recovered from the warrantless search of the Ford Fusion (Issue III) independently or cumulatively warrants reversal and remand for a new trial, so that these issues may be fully and fairly considered by a new jury on a properly developed record.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse his convictions and order that he receive a new trial.

RESPECTFULLY SUBMITTED:

s/ Ryan McKaig
s/Aaron Wallace
Wallace Law Firm
1416 Laurel Street, STE B
Columbia, SC 29201
Attorneys for Appellant

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Columbia, South Carolina.